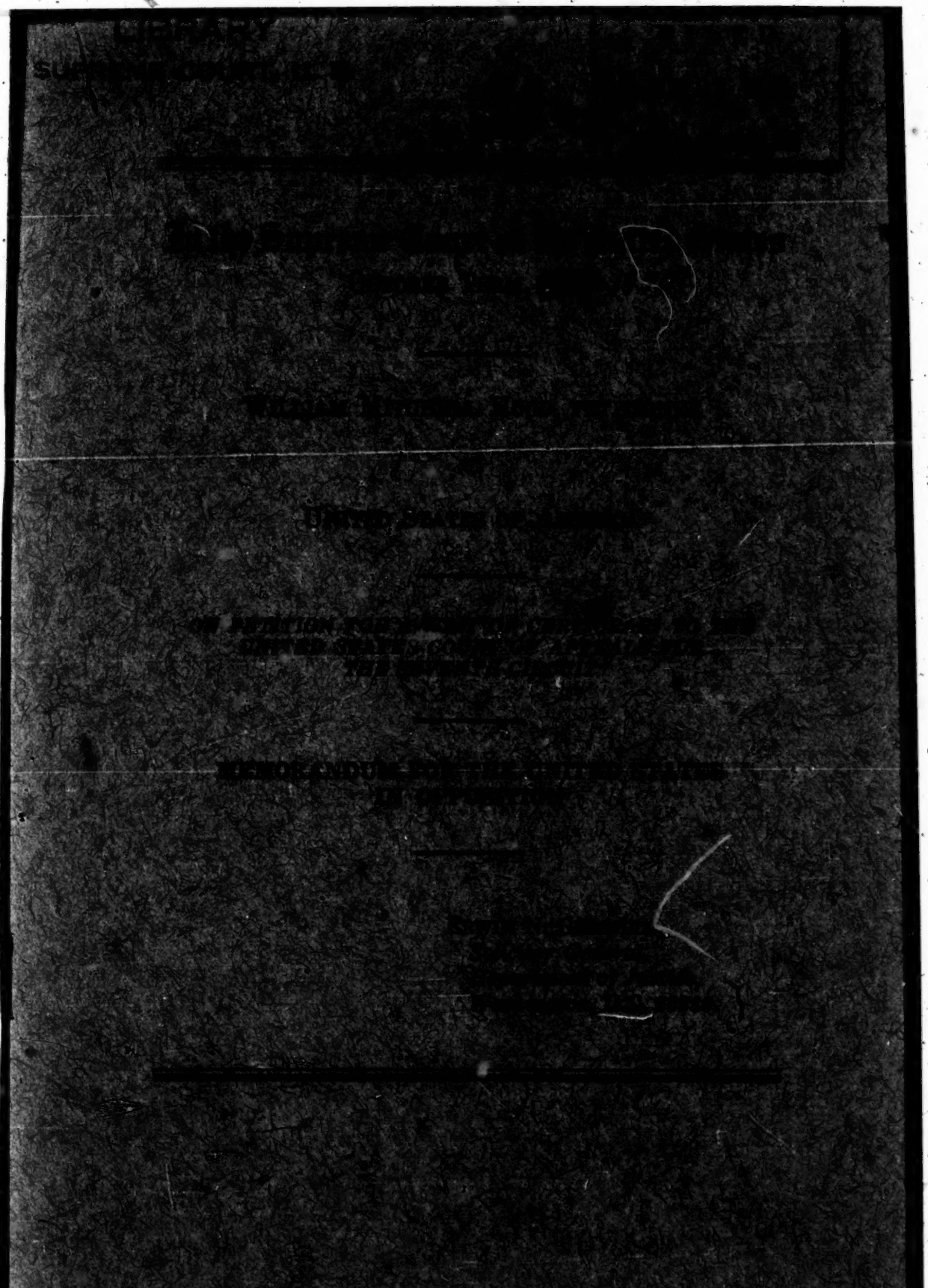

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1610

WILLIAM MITCHELL HOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on three counts charging receipt and concealment of Mack truck tractors moving in interstate commerce, 18 U.S.C. 2313, and sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed as to two counts but reversed the third for insufficiency of the evidence.

1. The principal issue, as to which there was a dissent below, relates to the sufficiency of the affidavit to support the search warrant, sworn to by an FBI agent and a state trooper. The affidavit described the model, year, maker's name, and color of truck tractors believed to be on the premises of Frigid Food, and stated that the affiants themselves knew that these tractors had been stolen.[1] Their information as to presence of these trucks, they said, had been received from three different informants. One, described as a reliable informant who "on various occasions in the past furnished information leading to the recovery of similar type stolen property," had seen most of the described tractors on the premises of Frigid Food. As to the other informants, the affiants could say only that they believed them to be reliable. One of those informants reported that employees of Frigid Food were stealing truck tractors and that he had personally seen one tractor which had been stolen in Cincinnati, and three which had been stolen in Chicago, at the premises. The other observed the use by Frigid Food of many tractors known to him to have been stolen.[2] While the court of appeals' majority thought that there was an insufficient basis shown for concluding that the latter two informants were reliable if the information about them was viewed in the ab-

[1] The affidavit described two of the tractors by the Frigid Food express unit and a third by vehicle, transmission and engine numbers.

[2] The vehicles identified by this informant included two which had been identified by unit number by the first informant.

stract, it held that their statements could be considered as adding corroboration to the reliability of the first informant (Pet. App. 4). This conclusion is clearly reasonable.

Petitioner in this Court stresses the contention that the affidavit does not specify how the informants knew the vehicles had been stolen (Pet. 14-16). This argument overlooks the fact that it was the *affiants* who stated that they had been stolen. A magistrate could reasonably conclude that an FBI agent and state policeman would be able to ascertain whether a vehicle had been stolen on the basis of the descriptions supplied by the informants.

2. The court of appeals held that testimony by an agent for the National Auto Theft Bureau as to a report of the theft of the tractor involved in count 2, and testimony from insurance records as to the theft of the vehicle involved in count 3, were inadmissible hearsay insofar as this evidence was used to establish the fact of theft. It reversed the conviction on count 3 on this basis but not the conviction on count 2 since there was, as to that count, independent evidence of theft. Petitioner argues that the admission of the hearsay testimony was prejudicial as to count 1 (Pet. 18-21), since the jury would be more likely to infer guilty knowledge from possession of three vehicles than one. Petitioner's argument endeavors to read out of the case the independent evidence of theft shown in count 2. Moreover, even accepting the view of the court of appeals that the testimony from insurance records could not prove the fact of guilt, it does not follow that the evidence would be inadmissible as

bearing on petitioner's knowledge and intent. The circumstance that petitioner's firm possessed, in addition to the truck tractor charged in count 1, two other tractors with altered frame serial numbers and which had been reported to be stolen (see Pet. 9-11) would be relevant on intent even if the report was not proof of theft.

3. As petitioner admits, (Pet. 23) an instruction as to the inference which may be drawn from recent possession of stolen property has consistently been upheld. (See also Pet. App. 9.) The instruction given here made clear to the jury that it was not bound to draw such an inference and that the jury could find possession consistent with innocence (Pet. 13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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